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A Territorial Approach to Representation for Illegal Aliens

The decennial census determines each state's population for the purpose of apportioning seats in the House of Representatives. Because the Census Bureau counts illegal aliens along with all other "persons," states with significant illegal alien populations will enjoy greater representation in relation to registered voters or legal inhabitants than will states without such alien populations. This Note addresses the issue of whether the Constitution permits, requires, or leaves to congressional discretion the inclusion of undocumented aliens in the "persons" counted to apportion representatives among the states.

While this issue is not new, recent efforts to alter the apportionment of representatives to reflect population exclusive of undocumented aliens have renewed constitutional scrutiny of the proposed

1. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. The census figures also are used to allocate votes in the Electoral College, and to appropriate federal funds. See U.S. CONST. art. II, § 1, cl. 2; Note, Numbers that Count: The Law and Policy of Population Statistics Used in Formula Grant Allocation Programs, 48 GEO. WASH. L. REV. 229 (1980).

2. Census Bureau procedures are dictated by statute, 13 U.S.C. §§ 1-307 (1976). Section 141(b) contemplates counting all persons:

   The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States 13 U.S.C. § 141(b) (1976) (emphasis added). The only persons presently not counted by design are diplomats and foreign tourists. The former reside on embassy grounds which are considered foreign soil and, therefore, not part of any state; the latter do not reside here at all. Federation for Am. Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 567 (D.D.C. 1980).

3. The term "undocumented alien" is more accurate than "illegal alien" in that it describes either those who have entered the country without proper documentation or those who have remained in the country beyond the expiration date of their immigration documents. As used in this Note, illegal alien means an undocumented alien.

4. In 1940, when Congress was amending an act that provided for the fifteenth and subsequent decennial censuses, the issue of counting resident aliens was raised and argued on the floor. See 86 CONG. REC. 4366-83 (1940). The discussion was aimed at documented aliens. Representatives then seemed to accept the argument that aliens as persons could not be excluded without a constitutional amendment. Consider the remarks of Representative Celler of New York:

   The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. We count the convicts who are just as dangerous and just as bad as the Communists or the Nazis, as those aliens here illegally, and I would not come here and have the temerity to say that the convicts shall be excluded, if the founding fathers say they shall be included. The only way we can exclude them would be to pass a constitutional amendment.

   Id. at 4372 (Rep. Celler). See also id. at 4367 (Rep. Warren).

   The statute under consideration, originally passed in 1929, provided for the census and for automatic reapportionment in the event that Congress did not act within a specified time. The President was to transmit the census results. The twentieth amendment, enacted in 1933, altered the date for Congress's second session and advanced the inauguration of the President,
changes. Recently Congress specifically discussed counting illegal aliens, and opponents of their exclusion again argued that such a policy would violate the Constitution. The courts as well as the legislature have confronted this issue of including illegal aliens in the census. The Federation for American Immigration Reform (FAIR) brought suit to enjoin the Census Bureau from including, without adjustment, illegal aliens in the population figures. Although dismissed for lack of standing, the action raises some interesting constitutional questions on the merits.

FAIR raised two principal arguments to support its claim that allocating representatives on the basis of census data that count illegal aliens violates the Constitution. First, FAIR contended that the rendering the time limits of the 1929 act no longer workable. The primary purpose of the new bill therefore was to amend the act to conform with the new congressional schedule.

The House Committee had included a provision excluding aliens from the population totals. The bill in this form passed in the Senate; yet the House version did not include this provision. Id. at 4367. The discussion about aliens was prompted by the missing provision. The bill was passed with no reference to aliens. Id. at 4386.

From 1929 to 1947, various members of both the House and Senate introduced what appears to have been the same constitutional amendment, which would have provided for apportionment based on citizen population. See, e.g., 62 CONG. REC. 490 (1929); 67 CONG. REC. 455 (1925); 71 CONG. REC. 53 (1929); 75 CONG. REC. 2453-54 (1932); 78 CONG. REC. 6637-41 (1934); 84 CONG. REC. 1003 (1939); 87 CONG. REC. 465 (1941); 93 CONG. REC. 718 (1947) (Rep. Capper claiming he had been trying for 25 years to get the amendment submitted to the states). Each time the amendment was referred to committee; it was never voted on. After 1947 interest in the amendment seems to have disappeared.

5. See 126 CONG. REC. H7263-72 (daily ed. Aug. 20, 1980). The debate concerned the McDade amendment which sought to block the funds needed to certify the census figures and transfer them to the President. Id. at H7263. Representative McDade was a plaintiff in FAIR v. Klutznick, id., at H7264, and his amendment was aimed indirectly at the illegal alien issue.

6. Id. at H7266 (Rep. Garcia), H7269 (Rep. Leach), H7271 (Rep. Clinger). Rep. McDade, however, believed that a constitutional amendment was unnecessary. Id. at H7266. The McDade amendment passed in the House on August 20, 1981, 222 votes to 189. The bill was ineffective in keeping the census figures from being transmitted. Since the McDade Amendment says nothing about illegal aliens, it is hard to regard it as a definitive expression of congressional interpretation of the census clause. There is also a good argument that the McDade Amendment itself was unconstitutional because it sought to delay the census beyond the ten-year period required in article I, section 2.


8. The short census form, which was to be sent to 80% of households, included no questions about citizenship. The long form, which was to be sent to the remaining households, included questions about citizenship but did not provide a means of differentiating documented from undocumented aliens. 486 F. Supp. at 567 n.4. FAIR also argued that the Bureau, in an effort to increase the probability of counting the entire population, had actively encouraged illegal aliens to respond to the census. 486 F. Supp. at 567 n.5.
introductory phrase in the original article I, section 2, "People of the Several States," refers to lawful residents only.9 FAIR reasoned that because the United States did not adopt its first immigration law until 1875, seven years after the adoption of the fourteenth amendment,10 the framers of both the original and amended census clauses could have had no intent regarding illegal aliens.11 The census clause, therefore, does not prevent the courts from interpreting it to exclude the illegal alien population.

Second, FAIR argued that the "one person, one vote"12 standard applied by the Supreme Court to intrastate congressional districting requires exclusion of illegal aliens. FAIR claimed that three to eight million illegal aliens,13 concentrated in a few states, would cause a disproportionate allotment of representatives to those states.14 This would dilute the voting power of citizens in states without a significant illegal population, and cause those citizens to "receive a lesser share" of federal funds.15 This result, FAIR contended, would contravene the "one person, one vote" standard set by the Supreme Court.

This Note rejects these arguments in favor of the thesis that the census clause affirmatively requires including illegal aliens in the census figures used to apportion representatives among the states. Part I argues that the framers intended to allocate representation among the states based on a number of considerations, including wealth, and chose total population within the territory of each state as the best measure of those considerations. Part II contends that the requirement of individual equality in voting rights does not apply to interstate comparisons of voting power. Rather, a specific structural agreement reached by the states as sovereign entities governs the allocation of representation among them. Part III argues that while the question of counting illegal aliens in the census presents numerous technical and political issues subject to congressional discretion,

11. See Brief for Appellants, supra note 9, at 18-20.
13. 486 F. Supp. at 567. The estimates of the illegal alien population in the past ten years range from 3.5 to 12 million. Recent Census Bureau estimates place the figure at less than 6 million and probably as low as 3.5 million. See N.Y. Times, Feb. 4, 1980, at A12, col. 4. In 1974 the Immigration and Naturalization Service estimated that there were 6 to 12 million illegal aliens in the country. See Salinas & Torres, The Undocumented Mexican Alien, 13 Hous. L. Rev. 863, 866 (1976). In 1975, Leonard F. Chapman, Jr., Commissioner of the Immigration and Naturalization Service, wrote that the actual number was probably between 6 and 8 million. See Chapman, A Look at Illegal Immigration: Causes and Impact on the United States, 13 San Diego L. Rev. 34, 35 (1975).
15. 486 F. Supp. at 586. See also note 1 supra.
the essential constitutional issues concern the interpretation of article I, section 2, especially the definition of "person." These issues ultimately lie within the purview of the Supreme Court.

I. THE MEANING OF THE CENSUS CLAUSE

The conclusion that the census clause requires apportionment of representatives according to population data that include illegal aliens follows from the constitutional language, the light cast on its original intent by its structure and history, and by the reaffirmation of these considerations in the fourteenth amendment. These concerns strongly suggest that the framers adopted a territorial, rather than popular, approach to representation in the House as well as the Senate. This territorial model implies that the states enjoy a constitutional right to representation based on the number of "persons" — illegal aliens included — within their borders.

A. The Constitutional Language

The language of the census clause provides a starting point for determining its meaning. This language "is not ambiguous"; it requires "adding the whole Number of free Persons . . . ." Illegal aliens, although "not a component of the population at the time the Constitution was adopted, . . . are clearly persons."

Any distinction between undocumented aliens and "persons" must depend upon the legal status of the former. Other distinctions lead to contradictions. If illegal aliens do not qualify as legal persons, their transformation through naturalization into citizens, for example, can occur only if personhood, like citizenship, is a legal category rather than an inherent attribute. The contention that illegal aliens exist wholly outside the law because their very presence violates the immigration laws offers such a legal distinction. Illegal aliens included — within their borders.

16. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. . . .
U.S. Const. art. I, § 2, cl. 3.

17. See Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819) (Marshall, C.J.) ("[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."). And while strict literalism does not dominate accepted modes of constitutional analysis, even those who view the Constitution as a vehicle for the legal expression of contemporary values treat "the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking." Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 237 (1980) (footnote omitted).

19. See note 16, supra.
21. For this argument in the equal protection context, see Burrafato v. United States Dept.
aliens, according to this argument, enjoy precisely the same status under United States law as they would have had they remained in their country of origin, that is, no status at all. Litigants have raised this argument in various attempts to deny illegal aliens access to the courts and the protection of the law.22

Three related objections render the outlaw approach unpersuasive. First, considerable authority has rejected this view in other contexts. The Supreme Court has repeatedly included aliens among the “persons” protected by the due process clause of the fifth and fourteenth amendments,23 even when their presence is illegal.24 Lower federal courts have upheld the personhood of illegal aliens for both due process and equal protection purposes. In Doe v. Plyler,25 the court held that while violation of the immigration laws could give rise to some disabilities imposed by the federal government and that plaintiffs’ status as aliens could support their exclusion from participation in governmental functions within the state, no precedent permits the states to impose other disabilities based only on a violation of the immigration laws.26 In Williams v. Williams,27 a federal district court found no relationship between a violation of the immigration laws and a divorce action and held that denying an alien access to the divorce court based on undocumented status of State, 523 F.2d 554, 557 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), and Hernandez v. Houston Ind. School Dist., 558 S.W.2d 121, 124 (Tex. Civ. App. 1977), cited in Comment, Equal Protection and the Education of Undocumented Children, 34 Sw. L.J. 1229, 1234 n.34 (1981). See also Comment, The Legal Status of Undocumented Aliens: In Search of a Consistent Theory, 16 Hous. L. Rev. 667, 695-96 (1979) (comparing the outlaw approach of the Hernandez court with the analysis of Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978)).


The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.’ These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

24. See Wong Wing v. United States, 163 U.S. 228, 238 (1896), holding that while Congress may exclude and expel aliens at its discretion, and order their detention toward those ends, it cannot punish the crime of illegal entry without meeting the due process standards set by the fifth and sixth amendments. The Court declared:

Applying this reasoning [of Yick Wo] to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United State are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

25. 628 F.2d 448 (5th Cir. 1980). For discussion see note 29 infra.

26. 628 F.2d at 458. The court also pointed out that illegal entry is only a misdemeanor for the first commission. While this is irrelevant to the outlaw argument per se, it does demonstrate how disproportionate the disability would be in relation to the offense, if the outlaw approach prevailed.

would violate constitutional guarantees of due process and equal protection. While these decisions do not specifically concern the census clause, they strongly support including illegal aliens in any constitutional definition of personhood.

Second, the outlaw approach defies consistent application. Both the state and federal governments subject illegal aliens to their jurisdiction for purposes of imposing certain obligations, such as the duty to pay taxes or obey the criminal law. If justice requires treating like cases alike, excluding illegal aliens from legal protections and benefits constitutes a paradigm case of injustice, for such an arrangement treats the same individual as a person for purposes of burdening him and as a nonperson for purposes of protecting him.

Finally, and most profoundly, allowing the government to statutorily deny disfavored groups the status of persons would permit the evisceration-by-definition of the Constitution's most important protections of individual rights. Subjecting personhood, like citizenship, to changes in legal status would empower political majorities to determine the scope of provisions that arose from the very fear of the abuse of majority power.

As this Note went to press, the Supreme Court decided the case in favor of the alien children. Plyler v. Doe, N.Y. Times, June 16, 1982, §1, at 15 col. 1. Although the court divided by five votes to four, none of the justices appear to have opined that the equal protection clause does not apply to illegal aliens. Writing for the Court, Justice Brennan observed that "whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." Plyler v. Doe, N.Y. Times, June 16, 1982, §1, at 15 col. 1. This result, of course, reinforces the argument made in the text.
interstate representation does not merit such a risk. Consequently, the outlaw approach should be rejected in favor of the territorial model mandated by the plain language of the census clause.

B. The Framers' Intent

Analyzing the intent behind the census clause clarifies whatever ambiguity may inhere in its language. Based on three major arguments, this Note defends the view that the intent animating the census clause strengthens the case for counting illegal aliens. First, the framers meant to allocate representation, in the House as well as the Senate, to the states rather than to the people as individuals. Second, the framers intended to apportion representatives among the states based on a combination of factors, prominently including wealth, and chose the number of persons within each state's territory as the measure — and not the source — of this political entitlement. Finally, illegal aliens measure a state's entitlement to representation as accurately as many other persons unquestionably within the ambit of the census clause.

1. States or Persons?

The framers conceived of representation, even in the House, as a function of federalism. The states, and not the individuals within them, constituted the polity to be represented. While the familiar view that the framers intended the Senate to represent the states and the House to represent the people does not wholly lack support, it

32. Illegal aliens would still be subject to deportation and other rights and disabilities would still be fashioned within Constitutional bounds. Resident aliens do not enjoy all of the privileges afforded citizens, e.g., Mathews v. Diaz, 426 U.S. 67 (1976) (upholding a federal statute denying resident aliens federal medical insurance benefits unless they met a residency requirement); Ambach v. Norwich, 441 U.S. 68 (1979) (upholding a state statute excluding aliens from jobs as public school teachers). Similar and perhaps broader disabilities would be upheld for illegal aliens.

33. See, e.g., C. RoSSITER, 1787: THE GRAND CONVENTION 193 (1966). This view relies somewhat on a statement to the Convention by Dr. Johnson:

On the whole he [Dr. Johnson] thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in one branch the people ought to be represented; in the other, the States.

1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 461-62 (M. Farrand ed. 1937) (hereinafter cited as RECORDS). Madison includes several similar statements in THE FEDERALIST Nos. 39
fails to explain as well as the competing territorial model does the interstate conflict that gave rise to the Great Compromise, the framers' concern with representing wealth, or the discounted inclusion of the slaves in the population base of representation.

The census clause emerged from a compromise between the competing interests and philosophies of members of the Continental Congress. The primary conflict involved whether the states would be represented in the legislature equally or proportionately by size. The large states, proponents of the Virginia Plan, advocated representation in the legislature proportional to "the Quotas of Contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." The small states, proponents of the New Jersey Plan, urged that each state be represented equally in the legislature, as provided under the Articles of Confederation. The Great Compromise established a bicameral legislature with the Senate providing an equal number of representatives for each state and the House providing a number of representatives for each state proportional to its size.

This history suggests that the framers fashioned the Great Compromise less to represent both the states and the people than to provide a mutually satisfactory system for representing the states. Had the delegates perceived the issue as one of ideology, i.e., whether the legislature should represent the people directly, a purely state-oriented division of opinion probably would not have developed. The controversy, however, clearly split the large and small states. This historical foundation of the census clause in the competing interests of large and small states suggests a federal, rather than popular, view of representation in the intentions of the framers.

at 254-55, 58 at 392, 63 at 431 (J. Cooke ed. 1961). In The Federalist No. 54, however, Madison presents a defense of the territorial approach, less as his own view than as that of the Convention.


36. See 1 Records, supra note 33, at 20. The Virginia Plan provided for a legislature with two chambers. The first chamber was "to be elected by the people of the several states" and the second was to be chosen by the first using the nominations provided by state legislatures. Voting in both houses was to be proportional to population or "contribution." M. Farrand, supra note 35, at 68-70.

37. The New Jersey Plan was silent on the issue of representation but made its position clear by advocating amendments to the Articles of Confederation rather than a new plan of government. See 1 Records, supra note 33, at 242-45.

38. U.S. Const. art. I, § 3, cl. 1; U.S. Const. art. I, § 2, cl. 3.

39. See note 35 supra.
The founders' concern for representing wealth further supports the federal model of representation. Gouverneur Morris, for example, forthrightly declared his belief that because "property . . . was the main object of government, . . . it ought to be the measure of the influence of those who were to be affected" by it. Even Dr. William Johnson, who had urged that the House should represent the people, expressed the belief that "wealth and population were the true, equitable rule of representation." The framers solidified this relationship of wealth and representation by making population the measure of both representation and taxation. Thus each state would receive a number of representatives proportionate to its contribution through direct taxation to the federal government. Few, if any, delegates quarreled with this arrangement; indeed, the framers viewed taxation and representation as substantially interdependent. While few delegates believed that wealth constituted the only basis of representation, the broad consensus approving a major role for property in the allocation of representatives seriously weakens the view that the framers intended direct representation of

40. Nowhere in the discussion as far as it is recorded, did anyone urge the representation of men as men. Be it remembered that was a new idea in the world, born only eleven years before, in London, and not yet familiar on this side of the ocean. There can be no shadow of question that populations were accepted as a measure of material interests — landed, agricultural, industrial, commercial, in short, property. This appears in the quite arbitrary grant of representation proportionate to three fifths of the number of slaves. They were not to be represented because they were human beings; their owners were to be represented in the ratio of ownership of human property. Again, only taxed Indians were to be counted, for they alone of the red men had any property. Most convincing of all, "representatives and direct taxes" were coupled in the paragraph providing for apportionment among the States "according to their respective numbers."

In view of all this, it would seem indisputable that citizens and aliens were not as such in the minds of the men who wrote the Constitution nor of those who were delegates to the ratifying conventions. Our fathers meant to apportion the membership of the House on the basis of all who dwelt within the respective States. Property was the basis, not humanity. Such political philosophy might not prevail to-day were the Constitution to be written anew, but until the Constitution is changed, it must be construed as it was meant to be construed.

R. Luce, Legislative Principles 356-57 (1930). Even Madison admitted the legitimacy of the Convention's concern for representing property. See The Federalist No. 54 (J. Madison) 367-70 (J. Cooke ed. 1961) ("Government is instituted no less for protection of the property, than of the person of individuals. The one as well as the other, therefore may be considered as represented by those who are charged with the government.")

41. 1 Records, supra note 33, at 533.

Gouverneur Morris opposed population as the basis of representation because he felt it did not accurately reflect property, see 1 Records, supra note 33, at 582.

42. See 1 Records, supra note 33, at 461-62 (Dr. Johnson).

43. Id. at 593.

44. U.S. Const. art. I, § 2, cl. 3.

45. See The Federalist, No. 54 (J. Madison) 366-67 (J. Cooke ed. 1961); 1 Records, supra note 33, at 562.

the people. Rather, the founders viewed wealth as one of the factors that determined each state’s entitlement to representation.

The counting of three fifths of the number of slaves reinforces this conclusion. No one felt that slaves as such deserved representation, but the sectional interests raised by the slavery question and the accepted emphasis on representing wealth made it difficult to argue for their total exclusion. Northern delegates opposed counting the slaves because they feared that granting the South increased representation by virtue of the slaves would serve only to encourage the institution. On the other hand, if the Union profited by taxing the wealth of the South, that wealth required measurement with concomitant representation for the contribution. The Convention ultimately adopted the three-fifths formula, developed earlier in the Resolution of April 18, 1783, governing revenue, and accepted as the "federal ratio."

The theory that the framers intended the House to represent the people cannot account for this history. If “the people” included slaves, the census clause would have made no exception for them. If slaves counted as partial persons, this disability had to stem from

47. Pierce Butler and Gen. Charles Pinckney, both of South Carolina, felt that blacks should be counted equally for representation. Butler argued that their labor contributed as much as that of freemen and that because the government “was instituted principally for the protection of property, and was itself to be supported by property,” the slaves should be counted equally. See 1 RECORDS, supra note 33, at 580-81. This proposal was defeated twice in two days by votes of seven to three and eight to two. Id. at 580-81, 596.

Few delegates argued that the slaves should not be counted at all. Id. at 580-95. Mr. Morris did say that Pennsylvania would never accept representation for the slaves. Id. at 593. James Wilson suggested that the rule of representation be “expressed as to make the [slaves] indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation; and as representation was to be according to taxation, the end would be equally attained.” Id. at 595. Northern hostility to the provision surfaced later in the Convention. See 2 RECORDS, supra note 33, at 220-23 (Rufus King); RISSITER, supra note 35, at 267-68.

48. See 2 RECORDS, supra note 33, at 220-23; C. RISSITER, supra note 35, at 267-68. Some of the framers feared that counting the slaves would encourage the southern states to further increase the slave population. The national government was precluded from regulating their importation until 1808. U.S. CONST. art. I, § 9, cl. 3.

49. See 1 RECORDS, supra note 33, at 562.

Mr. King had always expected that as the Southern States are the richest, they would not league themselves with the North unless some respect were paid to their superior wealth. If the latter expect those preferential distinctions in commerce & other advantages which they will derive from the connection they must not expect to receive them without allowing some advantages in return. Eleven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and Representation ought to go together. Id. (William Paterson’s notes). See also 3 RECORDS, supra note 33, at 342-43 (William Davie’s remarks in the North Carolina Convention regarding the three-fifths formula).

50. Farrand argues that little debate on the issue of counting slaves actually took place because of the connection to taxation and the accepted ratio. M. FARRAND, supra note 35, at 108-09. But see S. LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 156-83 (1967). Lynd claims that slavery was the underlying cause of the sectionalism apparent in every aspect of the convention and that the three-fifths compromise was much more complex than Farrand asserts.

51. See The Federalist No. 54 (J. Madison) at 369 (J. Cooke ed. 1961).
their perceived racial inferiority or their condition of servitude. Yet the census clause plainly required counting free blacks and whites bound to service for a term of years. Only when viewed as a political compromise to the property interests of the southern states does the three-fifths compromise comport with the rest of the census clause. This view leaves little room for direct representation of the people.52

2. Measuring the Rights of States to Representation

If the framers intended to apportion representatives among the states, why did they provide that a state’s representation would vary with the number of persons inhabiting its territory? The preceding analysis suggests that the founders chose population as the best practical measure of each state’s entitlement to representation. Population obviously satisfied the interests of the larger states in proportional representation. Population further appealed to the framers as the most practical measure of wealth available.53 Indeed, population may well have offered the only feasible method of measuring wealth,54 and the opposition to relying on population largely concerned its accuracy as a reflection of property.55 The Convention, moreover, made no attempt to ensure popular input into the selection of representatives. The founders put forward no national voting qualifications to supplant the widely varying state standards,56 many of which included substantial property qualifications.57 This indifference to the manner by which the states chose representatives clearly implies that the framers viewed the census of

52. Quite apart from questions about the basis of representation, it may be argued that discouraging illegal immigration justifies excluding illegal aliens from the census, in a manner analogous to the effort of the Northern states to discourage slavery through the three-fifths compromise. FAIR, for example, ordinarily concerns itself with immigration reform, not representation. Unlike the slavery case, however, individual states have little, if any, control over illegal immigration. See Hines v. Davidowitz, 312 U.S. 52 (1941) (federal interest in integrated scheme for registering aliens preempts state alien registration laws). While excluding this group from apportionment figures may reduce its desirability as an element in the population of a given state, the exclusion could influence immigration, if at all, only indirectly.

53. See, e.g., 1 RECORDS, supra note 33, at 579, (“He [Mr. Mason] urged that numbers of inhabitants; though not always a precise standard of wealth was sufficiently so for every substantial purpose.”), 587 (“Mr. Ghorum supported the propriety of establishing numbers as the rule. He said that in Massats. estimates had been taken in the different towns . . . and it had been found . . . that the most exact proportion prevailed between numbers & property.”); A. DEGRAZIA, PUBLIC AND REPUBLIC 95 (1951); Rossum, supra note 46, at 100.

54. See 3 RECORDS, supra note 33, at 342 (Remarks of Mr. Davie in the North Carolina Convention).

55. Gouverneur Morris opposed population as the basis of representation because he felt it did not accurately reflect property, see 1 RECORDS, supra note 33, at 582. One commentator has suggested that if the Framers could have foreseen the capability of the modern census organization, considerable debate would have arisen about “the value of property over numbers.” A. DeGrazia, supra note 55, at 100.

56. See THE FEDERALIST No. 54 (J. Madison) at 369 (J. Cooke ed. 1961).

57. See, e.g., H. Gosnell, DEMOCRACY: THE THRESHOLD OF FREEDOM 36 (1948).
persons as no more than the measure — and not the locus — of each state's right to representation.

3. **Illegal Aliens as a Measure of the States’ Rights to Representation**

This Note argues that the framers intended to measure a state’s right to representation by the number of persons within its territory. Three considerations support the conclusion that illegal aliens fall within the category of persons encompassed by this territorial view. First, insofar as population measures material sources of representation, illegal aliens fulfill the framers’ intent to reflect wealth in the census that apportions representatives. To the extent that illegal aliens take jobs American workers will not accept, their presence signals a welfare gain for the state’s economy. Insofar as illegal aliens compete with citizens in the labor market, the employed aliens contribute more to the state’s economy than the unemployed citizens they displace. Only if aliens drain state welfare budgets or send the vast bulk of their earnings out of the state would they fail to reflect the economic factors that the framers felt deserved representation. In all probability, neither phenomenon reaches sufficient proportions to negate the positive contributions of illegal aliens to local economies.

The accumulation of wealth and the payment of taxes, as

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58. "The simplest and most abstract truth about immigration — legal or otherwise — is that it increases the supply of available labor and therefore makes labor cheaper, product prices lower, and employment greater. In this simple view, immigration promotes profits, economic growth, and general prosperity, with possibly excessive demands for social capital formation (schools, hospitals, housing) the only cloud on this otherwise pleasing picture." Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 67 (1977). While Fogel goes on to disapprove of illegal immigration, at least during periods of high domestic unemployment, because of its tendency to displace disadvantaged members of the legal labor force, such distributional concerns have no relation to the Framers’ desire to represent the states on the basis of their wealth. Even if illegal aliens displace significant numbers of legal workers — a hotly debated issue — they contribute thereby to the gross product of the state. This suffices to bring them within the purpose of the census clause to measure a state's entitlement to representation based on wealth.

59. "In the last few years, public and private studies have uniformly discredited the direct drain theory. Data strongly suggest that only one to four percent of undocumented Mexicans take advantage of public social services such as welfare, unemployment benefits, food stamps, AFDC benefits and the like; that eight to ten percent actually receive “free” medical services; that about seventy percent pay Social Security and income taxes; that the majority do not file for an income tax refund; that all contribute to sales taxes; and that at least some contribute to property taxes. In terms of tax dollars paid versus social services consumed, undocumented Mexicans are overwhelmingly in the black.” Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 636-37 (1981) (footnotes omitted). While undocumented aliens surely send a significant portion of their earnings out of the United States, two considerations prevent this fact from eroding the utility of illegal aliens as indicators of a state’s wealth. First, as a matter of economic theory, illegal aliens will find employment only on terms mutually beneficial to themselves and to an employer. The salary agreed upon increases the utility of both parties. Consequently, even if all the money paid to illegal aliens were sent to other countries, never to return, illegal aliens would still reflect a positive contribution to the wealth of the state, because the value of their services exceeds the value of their wages. Second, a significant portion of an illegal alien’s income must be spent in
reflected by the measurement of population, constitute the attributes of a state that the framers meant to represent.60

Second, the specific exceptions contained in the census clause for Indians not taxed and slaves support, by contrast, the case for counting illegal aliens. That the framers felt compelled to modify the "persons" language to ensure special treatment for slaves — a class possessed of "no rights which the white man was bound to respect" 61 — suggests an extremely comprehensive reading of the persons included. Surely illegal aliens, possessed of some legal rights, 62 reflect a state's entitlement to representation to a considerably greater degree.

The exception for Indians not taxed makes this point still clearer. Legally, Indian tribes were "distinct political communities," analogous to foreign nations, over which the states enjoyed no jurisdiction. 63 The framers excepted Indians within these communities because the state had no power to tax Indians living outside the territory over which it exercised jurisdiction. The exclusion in the census clause reflects the territorial model of apportionment; those outside the state's jurisdiction do not increase its entitlement to representation.

When an Indian left his tribe, however, he became subject to the state's jurisdiction and thus included in census counts relied on for apportioning representatives.64 This result held even for an Indian who did not qualify as a citizen under the fourteenth amendment. 65

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60. See notes 40-46 and accompanying text, supra.
62. See notes 23-24, supra.
63. See Elks v. Wilkins, 112 U.S. 94, 99-100 (1884):
The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. . . . Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State.
See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (opinion of Marshall, C.J.).
64. See 112 U.S. at 111. Under Nebraska law, as a resident, Elk was subject to taxation, was a member of the militia, and "he is counted in every apportionment of representation in the legislature; the requirement of [Nebraska's] Constitution being, that 'the legislature shall apportion the Senators and Representatives according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army,'" 112 U.S. at 111, quoting Neb. Const. art. 3, § 1 (emphasis added). While this is the Nebraska Constitution, its similarity to the U.S. Constitution is obvious. In any event, Elk, being subject to state taxation, would also be counted for apportionment under the U.S. Constitution.
65. Elk argued that he was covered under section 1, which says, "full persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the
Thus, the legal status of an inhabitant does not affect his inclusion in the census, so long as he is subject to the territorial jurisdiction of the state.

The final consideration suggesting the similarity of illegal aliens and the "persons" who measure a state's right to representation concerns the treatment of legal aliens under the original census clause. The framers, as evidenced by the citizenship requirements for the president, senators, and representatives, were not unaware of distinctions between aliens and citizens. Many of them shared xenophobic prejudices as strong as any prevalent today. Had the founders intended to exclude aliens from the census, they would have done so affirmatively. In fact, aliens were routinely counted in the census, and generally enjoyed considerably broader political rights than they do today.

By every test except legality, then, undocumented aliens conform to the criteria envisioned by the framers for inclusion in the census. While we will never know if the framers would have considered legality relevant, much less essential, for inclusion in the census, that distinction by itself justifies excluding illegal aliens only when coupled with the complete approval of the dangerous and implausible outlaw approach.

C. The Fourteenth Amendment

The principles underlying the census clause of the fourteenth amendment differ little from those underlying the original clause. The framers of the amendment remained primarily concerned with allocating representation among the states and the language chosen

United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1 (emphasis added). The majority interpreted the clause as conferring citizenship by birth or naturalization only. Since Indians born in tribes were not subject to United States jurisdiction at the time of their birth, they could not achieve citizenship in this way but had to comply with formal procedures of naturalization dictated by particular treaty or statute. 112 U.S. at 103. Justice Harlan, dissenting, cited congressional debates in support of his view that the phrase, "and subject to the jurisdiction thereof," was intended to confer citizenship on any Indian who left his tribe, regardless of treaty or naturalization procedures. 112 U.S. at 117-23. Congress considered adding "Indians not taxed" after "subject to the jurisdiction thereof" in the citizenship clause, but decided that the meaning might be confused, resulting in an exclusion of the poor, and that the language chosen would include Indians who had left the tribe anyway. 112 U.S. at 117-18.

66. Representatives must have attained citizenship status at least seven years prior to being elected. U.S. Const. art. I, § 2, cl. 2. Senators must have attained citizenship status at least nine years prior to election. U.S. Const. art. I, § 3, cl. 3. The President must be a naturally born citizen. U.S. Const. art. II, § 1, cl. 5.

67. See THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS (M. Grant & C. Davison eds. 1928) (collection of correspondence and writings on the subject of aliens).

68. See Rosberg, Aliens and Equal Protection: Why Not the Right To Vote?, 75 Mich. L. Rev. 1092, 1094 (1977). Rosberg points out that citizenship at that time was not a definition of voter and that in many situations aliens could vote while citizens could not. Id.
reflects the intent to include aliens. 69

During the debates on the amendment, the thirty-ninth Congress actually considered whether to count citizens, persons, or voters. 70 Since political equality would replace the three-fifths ratio, it became apparent that the Civil War would result in increased representation for the South in the House. 71 Northern Congressmen sought a formula for apportionment that would avoid this outcome. 72 Initially, they proposed that the census count only “qualified electors.” 73 They rejected this idea when the New England states discovered that they would lose, and the Western territories gain, representation using voters as the basis for apportionment. 74 A later version proposed counting citizens but provided that the freed slaves, if denied political rights, could be excluded from the figures determining the state’s share of representatives. 75 Eventually, Congress changed “citizens” in this version to “persons” due to fear that some of the large states with a number of aliens would reject the amendment because it would decrease their representation. 76 The provision enacted used “whole number of persons” but added a clause that would enable Congress to reduce the representation for any

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69. See text at notes 33-52 supra, and at note 76 infra.

70. See CONG. GLOBE, 39th Cong., 1st Sess. 353-59 (1866); James, The Framing of the Fourteenth Amendment, 37 ILL. STUD. SOC. SCI. 3, 21-23, 59-60 (1956).

71. CONG. GLOBE, supra note 70, at 357; James, supra note 70 at 21-22. The estimates at the time were that the South would gain by at least fifteen representatives and the Republicans, then in control, were concerned that the Democrats would gain a majority as a result of the South’s increased representation. If the freed slaves were counted but not allowed to vote in the South, southern voters would have substantially more voting power than their northern counterparts. “To avoid this or prevent its adverse effect on the Republican party was a practical problem having nothing to do with doctrinaire concepts of universal suffrage.” Id. at 22.

72. James, supra note 70, at 21-22.

73. Congress believed that the South would not allow the blacks to vote and that an enumeration based on voters would avoid the result of increased representation. If the South did allow the blacks the franchise, it was anticipated that they would vote Republican and the problem of losing power to the Democrats would be solved. Id.

74. These figures illustrate the point:

<table>
<thead>
<tr>
<th>States</th>
<th>Citizens</th>
<th>Voters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>1,221,432</td>
<td>227,429</td>
</tr>
<tr>
<td>Indiana</td>
<td>1,328,710</td>
<td>316,824</td>
</tr>
<tr>
<td>California</td>
<td>358,110</td>
<td>314,369</td>
</tr>
</tbody>
</table>

Id. at 23, 56

75. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States; provided that whenever in any State civil or political rights or privileges shall be denied or abridged on account of race or color, all persons of such race or color shall be excluded from the basis of representation or taxation. Id. at 57 (footnote omitted).

76. See CONG. GLOBE, supra note 70, at 359 (remarks of Mr. Conkling); James, supra note 70, at 59. James also points out that some states allowed aliens to vote and the framers felt it necessary to include them in the provision. Id. at 195-96.
state denying the franchise to male citizens more than twenty-one years old.  

This history further supports the territorial model and renders less likely any constitutional purpose to represent the people in the House. The formula chosen emerged from a balancing of state, not individual, interests. The provision for excluding even citizens from the census to punish states for failing to extend the franchise reinforces this conclusion. And the specific intention to include aliens as persons strengthens the case for viewing illegal aliens as legitimate additions to a state's right to representation.  

The background of the original census clause and of the fourteenth amendment suggests that the framers chose the word “person” in each instance to include everyone within the territorial jurisdiction of the United States. Total population measured the relative wealth of the states and apportioned representation accordingly. Given these purposes, little reason exists to believe that the framers would have excluded illegal aliens. As a group they contribute through labor and taxes and in this respect cannot be distinguished from those counted. As the framers concerned themselves primarily with allocating representation among the states based on contribution, illegal aliens would have provided as adequate a measure as anyone else. 

II. Representation

The first Part of this Note has argued that the language and intent of the census clause compel counting illegal aliens in the decennial census. Contemporary notions of equality in representation, however, might justify another interpretation, especially for those who find the census clause ambiguous in spite of the preceding analysis. The plaintiffs in FAIR v. Klutznick argued that inclusion of

77. But when the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. U.S. Const. amend XIV, § 2.

78. See note 77 supra. But see Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946), which says that the provision was never actually used to reduce representation.

79. For an interesting article on constitutional interpretation, see Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033 (1981). Sandalow argues for a realistic view of interpretation and against the idea of a “core” meaning or an answer derived from the framers’ intent. The Constitution is read in light of contemporary values and it has been read “so that the circumstances and values of the present generation might be given expression in constitutional law.” Id. at 1051. The limitation on interpretation derives from the fact that constitutional growth is incremental and in this respect the intent of the framers, language of the document, and history are all relevant to current inquiry. Id. at 1063, 1068-72. The past, however, provides only guidance — not the answer. Id.

For other background on constitutional interpretation, see, e.g., Dworkin, Taking Rights Seriously (1977); Hurst, The Role of History, in Supreme Court and Supreme
illegal aliens would contravene the Constitution's principle of "one person, one vote," by diluting the voting power of citizens in states without significant illegal populations. The Supreme Court has held that this principle applies to congressional districting within states under the mandate of article I, section 2, and to the apportionment of state legislatures under the equal protection clause of the fourteenth amendment. The contention that this principle requires excluding illegal aliens from the census depends on the subsidiary claims that it applies to interstate as well as intrastate apportionment, and that illegal aliens do not belong in the category of persons entitled to political representation, and thus to the protection of the principle. While superficially plausible, neither claim survives close inspection.

A. Interstate Application of "One Person, One Vote"

In Wesberry v. Sanders, the Supreme Court ruled that article I, section 2's provision that representatives be chosen "by the People of the several States" "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." The Court reached this result over the vigorous dissent of Justice Harlan, who argued that the Constitution apportioned representatives among the states and conferred on each state the right to select its representatives as it chooses. Harlan pointed to the three-fifths compromise and the guarantee of at least one representative for each state as evidence that the framers did not intend to require that each representative represent approximately the same number of voters or inhabitants. The majority did not address these objections, but might have offered the distinction between interstate and

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LAW 55 (E. Cahn ed. 1954); Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502 (1964); Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769 (1971).


There has been a great deal written about the apportionment decisions. For a small sampling, see R. Dixon, Democratic Representation: Reapportionment in Law and Politics (1968); W. Elliot, The Rise of Guardian Democracy (1974); Auerbach, The Reapportionment Cases: One Person, One Vote — One Vote, One Value, 1964 Sup. Ct. Rev. 1; Rossum, supra note 46; Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33.

82. 376 U.S. 1 (1964).

83. 376 U.S. at 7-8.

84. 376 U.S. at 20-50 (Harlan, J., dissenting).
intrastate apportionment to explain the inconsistency between the formula for allocating representatives among the states and the one person, one vote precept.

The Court later held that the states could not adopt the system of representation adopted in the Great Compromise without violating this principle. In Reynolds v. Sims, the Court ruled that a legislative apportionment scheme providing for a geographic allocation of State Senators and a popular allocation of State Representatives violated the equal protection clause's guarantee of equality in voting power. Reynolds and its progeny make clear that unless some unidentified distinction exists between the standard set by article I, section 2, and that set by the fourteenth amendment, the federal system would fail the one person, one vote test if it applied. In the light of this failure, the Court's consistent distinction between the geographic allocation of representatives and senators required by the federal Constitution but forbidden to the states unmistakably indicates that the Wesberry and Reynolds test does not apply to interstate apportionment.

This conclusion reflects the genesis of the federal system in a compromise agreed to by sovereign states. These "unique historical circumstances" justify a different approach to interstate apportionment. The specificity with which the Constitution disdains the equal voting power principle — in the guarantee of one representative to each state, in the Senate, and in the Electoral College — confirms that the distribution of representation among the states should conform to the principles of federalism over the principle of equality. Those principles require counting illegal aliens in the census.

B. Population as the Standard for Measuring Equality of Voting Power

Assuming for the purposes of argument that the one person, one vote standard applies to interstate apportionment, inclusion of illegal aliens in the census would contravene it only if voters or citizens, rather than persons, measured the entitlement of a state to representation. A good deal of confusion, however, surrounds the question of whether representation under this standard should correspond to total population, number of citizens, or number of voters. This confusion appears to result from imprecise and undifferentiated refer-

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86. 377 U.S. at 574-75.
87. 377 U.S. at 574.
88. See, e.g., 376 U.S. at 28-29 (Harlan, J., dissenting) (one representative per state); Gray v. Sanders, 372 U.S. 368, 378 (1963) (Electoral College).
89. See notes 33-52 and accompanying text, supra.
rences to the related but distinct concepts of citizenship, representation, and suffrage. The Court's opinion in *Reynolds v. Sims* offers an excellent example. The Court held that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis" because "an individual's right to vote for state legislators is unconstitutionally infringed when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." The indiscriminate use of such terms as population, voters, and citizens creates significant ambiguity in the meaning of the one person, one vote epigram.

The census clause does little to resolve this confusion because it speaks only of the very formal process of allocating representatives for a certain number of people. Theoretically, the representative represents each person counted, even those not entitled to vote. The framers addressed only the issue of counting in article I, section 2, and left regulation of voting entirely to the states. At that time significant distinctions separated the related concepts of citizenship, representation, and suffrage. Only a small portion of the population could vote, but the census counted everyone for the purpose of congressional representation. Citizenship did not guarantee suffrage, and states that required property ownership as a prerequisite to voting often did not require citizenship. Often, alien property owners enjoyed the franchise while certain citizens did not.

The obscurity of article I, section 2, and the Court's apportionment decision leaves some scope for the argument that members of Congress represent voters, rather than population. This view would require excluding illegal aliens from the census because including them would distort the equality of representation among voters. While no clear consensus has emerged concerning the role of the

90. 377 U.S. at 568.
91. This theory is referred to as virtual representation. Although rejected as practiced in England, the concept underlies much of what was done by the framers in the area of representation. See G. Wood, REPRESENTATION AND THE AMERICAN REVOLUTION (1969).
92. It is a fundamental principle of the proposed Constitution, that the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each state is to be exercised by such part of the inhabitants as the State itself may designate. THE FEDERALIST, No. 54 (J. Madison) 369 (J. Cook ed. 1961). See also notes 74, 76 supra.
93. See H. Gosnell, DEMOCRACY: THE THRESHOLD OF FREEDOM 36 (1948) (One half of the male population was disenfranchised by property qualifications and as a result it is estimated that only three percent of the population voted in the first election under the Constitution).
94. Everyone except those specifically excluded was counted. See text at notes 66-68 supra.
95. See note 74 supra (comparing citizen and voter population); Rosberg, supra note 68 (on voting rights of aliens). See also U.S. Const. amend. XIX (granting women the vote).
96. See Rosberg, supra note 68, at 1094.
97. Id. at 1093-94.
representative in the United States,98 support does exist for viewing voters and not people as the represented. The broad trend toward expanding the franchise59 directs attention to voting rather than citizenship or population. By viewing the relationship between representative and represented in delegate terms, the voter becomes the central figure. From this position it takes only a small step to equate representation with voting.100 Universal suffrage, designed to make the representative more accountable to the constituency, begins to dominate and color thinking about the constituency itself.101 Because only citizens may vote, citizenship in turn becomes an additional qualification for representation.102 The emphasis in the apportionment decisions on the right to vote and the right to have each vote counted equally casts doubt on the right of nonvoters to representation.

Stronger arguments, however, support reliance on population as the baseline for measuring equality of voting power. First, the Court's decisions clearly indicate the constitutionality of the population standard. The Court has held that for apportionment of state legislatures, the state, in resolving a political issue, enjoys the discretion to rely on total population, citizen population,103 or registered

98. The thorough treatment of this topic would exceed the scope of this Note. See generally A. Birck, REPRESENTATION (1971); H. Gosnell, supra note 93, at 124-42; H. Pitkin, THE CONCEPT OF REPRESENTATION (1967); REPRESENTATION (J. Penrock & J. Chapman eds. 1968). In Political Representation: An Overview, in REPRESENTATION, id. at 12-13, Pennock divides the trustee/delegate problem into four propositions:
1. Representatives act in support of constituency desires.
2. Representatives act in support of what they believe is in the best interest of the constituency.
3. Representatives act in support of national desires.
4. Representatives act in support of national interest.
Pennock concludes that each theory operates at different times and that the representative is always balancing the various concerns.

99. See U.S. Const. amend XV (extending the franchise to black males); U.S. Const. amend XIX (extending the franchise to women); U.S. Const. amend. XXIV (eliminating the poll tax); U.S. Const. amend. XXVI (lowering the voting age to eighteen).

But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.

101. See Burns v. Richardson, 384 U.S. 73, 92-96 (1966); J. Ross, ELECTIONS AND ELECTORS 101 (1955) ("Universal suffrage necessarily treats every elector as precisely equal to every other elector: it can take account neither of differences of ability nor of differences of need. Hence, with universal suffrage, no justification can be found for giving greater weight to one vote than to another. The logical and inescapable consequence of this is that the ratio between the number of electors and the number of elected should, within a given electoral system, be everywhere the same . . . . ").

102. All states require citizenship for voting. Arkansas was the last state to eliminate alien suffrage and did so in 1926. Rosberg, supra note 68, at 1100.

voter population. So long as the state does not use one of these standards to "perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process," it may constitutionally adopt any of them. The rationale for protecting only those entitled to participate suggests counting only voters or citizens, but the Court explicitly held that the population standard fulfilled the one person, one vote criterion. Moreover, in *Kirkpatrick v. Preisler*, the Court expressed its doubt that the Constitution permits federal congressional districting on any basis other than total population. "There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2." Given that article I, section 2, and not the fourteenth amendment, imposes the one person, one vote standard on apportionment of representatives, reliance on total population is surely permitted and perhaps required by the Constitution.

Second, any nonpopulation standard faces considerable difficulty in discovering a test to exclude illegal aliens without also excluding persons whom the census has always counted. Illegal aliens may not vote, but neither may many other individuals who surely qualify as "persons." Examples include children, legal aliens, and felons. If the nonpopulation standard seeks to count only those entitled to representation, difficulties persist. Children, if citizens, perhaps have some claim to representation because they may vote in the future. Felons, on the other hand, while citizens, have permanently lost the right to vote. Resident aliens are not citizens and may not vote, but the history of the fourteenth amendment clearly reveals the intention

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104. See *Burns v. Richardson*, 384 U.S. 73, 91-97 (1966). The Court in *Burns v. Richardson* sought to limit its holding, that registered voter population was acceptable, to the facts of that case. The Court said that the use of registered voters was permissible because the resulting apportionment was substantially the same as it would have been using citizen population. 384 U.S. at 96-97. Citizens population figures were, however, unavailable and it is unclear how much leeway a state might have in showing that its system produced an apportionment that was substantially the same as it would be using citizen population.

105. 384 U.S. at 92.

106. See 384 U.S. at 73; cases cited in note 81 supra; note 102 supra.


109. 394 U.S. at 534. In *Kirkpatrick*, the Court expressly left open the question of whether a state could apportion its congressional districts using something other than total population. Even if states were allowed to use an alternate base in districting, under the present system they would still be allocated representatives based on the total population of the state.


111. See note 102 supra.

112. By implication, the fourteenth amendment permits states to disenfranchise felons. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (state constitutional and statutory provisions disenfranchising convicted felons are not inconsistent with equal protection); note 77, supra.
Neither the right to participate, nor the right to representation, distinguishes illegal aliens from groups well within the ambit of the census clause.

The only viable distinction between illegal aliens and groups such as felons and resident aliens concerns the illegality of their physical presence. This outlaw approach deserves no greater deference in the context of representation than it merits in interpreting the language of the census clause. If anything, the dangers of defining fundamental rights by reference to citizenship appear more clearly here, where reliance on such a standard would permit the government to manipulate the political process by altering the definition of citizen.

Several conclusions emerge from this analysis. First, plaintiffs like FAIR who seek to exclude illegal aliens from the census to avoid the dilution of their voting power should not prevail. The one person, one vote principle does not apply to interstate apportionment. If it did, allocation of representatives based on total population, legal and illegal, is constitutionally invulnerable. Second, should Congress act to change the basis of interstate apportionment the defenders of such a plan could not justify its deviation from the language and intent of the census clause by raising equality of voting power as a competing constitutional principle. Because population-based apportionment fully satisfies the equality principle, and the census clause speaks in terms of “persons” rather than citizens or voters, such a plan should not survive judicial scrutiny.

This legal analysis may succeed in establishing that the Constitution does not forbid dilution of citizens’ voting power by counting illegal aliens in the census. This, of itself, does little to dispel the doubts of those deeply committed to the contemporary egalitarian model of representation. Appeals to the intentions of the framers and the decisions of the courts do not address the normative beliefs behind that model. Yet the facts that counting illegal aliens may serve purposes of representation, such as the maintenance of federalism, that extend beyond rigid adherence to the egalitarian formula, that counting other individuals such as resident aliens routinely leads to a similar distortion, and that the ultimate dilution will prove relatively minor, may successfully countervail these concerns even on the level of political theory. An opposite conclusion, in any event, ought to be incorporated into constitutional law by direct amendment rather than interpretation. While the Constitution may retain the capacity for organic growth in response to contemporary political values, a decision in tension if not at odds with the use of “persons” in the constitutional language and the framers’ intent to represent the states seems beyond the scope of justifiable “growth.”

113. See text at note 76 supra.
To reach for such a result when contemporary views of representation are uncertain and perhaps inconsistent would give up some of the document's enduring stability in exchange for a doubtful concession to modern values.

III. THE LOCUS OF DECISION

This Note has advanced the thesis that the census clause requires including illegal aliens in the population count that governs the apportionment of representatives. Before reaching such a decision on the merits, a court adjudicating any challenges to the operation of the census must also decide whether the issue admits of judicial resolution. This Part argues that consideration of the practical difficulties with counting illegal aliens, the judicial doctrines of standing and political questions, and the arguments for judicial review supports the conclusion that the courts should not hesitate to dispense justice on the merits.

A. Practical Considerations

A number of practical concerns bearing on the decision whether to count illegal aliens suggest that Congress should decide the question. The most obvious question is whether the Census Bureau could exclude this population from the figures if instructed to do so. Given the enormous task of counting the population, it may be unreasonable to require that the Bureau refrain from counting a specific portion of the population, especially when that population is unwilling to identify itself. Beyond announcements that illegal aliens should not answer questionnaires, effective and workable procedures are hard to imagine.\(^{114}\)

FAIR suggested that the Census Bureau subtract estimates of the illegal alien population from total population figures.\(^{115}\) The main problem with this solution is that there is no assurance that the total population counted includes all, or even most, of the illegal aliens.\(^{116}\) If it does not, then the Bureau would be subtracting from citizen population. The second problem is that estimates of the illegal alien population range from three to twelve million.\(^{117}\) In short, no one knows how many there are to subtract.

\(^{114}\) See Note, supra note 1, at 265 ("The issue of whether to adjust data in ways not known to improve accuracy is peculiarly one for Congress.").


\(^{116}\) For some of the problems with attempting to count illegal aliens separately, see FAIR v. Klutznick, 486 F. Supp. at 568. The same factors that would make separate counts for aliens and citizens problematic also operate on the Census as presently conducted. Illegal residents tend to shun any contact with government agents that might result in their discovery and deportation. Consequently, the Census probably undercounts the alien population to a very significant extent.

\(^{117}\) See note 13 supra.
A more technical problem exists in determining the duration of undocumented status. There are a number of statutory provisions that make undocumented aliens meeting certain conditions ineligible for deportation.118 More fundamentally, and more prevalently, many undocumented aliens simply are not deported.119 Absent some official determination of status, an undocumented alien presumably retains that status despite changing circumstances. Nevertheless, at some point the alien has become a permanent inhabitant. In this situation, illegal entry seems a poor reason for excluding such a person from the census.

These practical problems are more properly within the purview of Congress, which can investigate the capabilities of the Census Bureau and gather information from other appropriate sources. But the decision also involves interpreting the phrase "whole number of persons" used in the census clause. Congress is fully capable of interpreting the Constitution and, in this case as in countless others, must do so to carry out its functions.120 Such a congressional determination, however, presents the question whether the Supreme Court should review this particular decision.

B. Standing To Sue

The availability of judicial review may turn on who brings suit. To establish standing in constitutional actions, a plaintiff must demonstrate, at a minimum, "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct," that the injury "fairly can be traced to the challenged action," and that the injury "is likely to be redressed by a favorable decision."121 The rationale for the standing requirement concerns the vigor with which a plaintiff will litigate his suit.122 Fear that a plaintiff without the incentive of an actual injury will prosecute his action

118. See, e.g., 8 U.S.C. § 1254(a)(1) (1976) (Attorney General can suspend deportation of an alien, who has resided here seven years or more and is of good moral character, if deportation would result in hardship to him or to his spouse, parent, or child who are lawful residents); 8 U.S.C. § 1254(b) (1976) (Attorney General can suspend deportation for an alien who has served 24 months or more in active duty in the Armed Forces).

119. See note 13 supra.

120. Congress considered whether to count aliens from 1929 until 1947 and recently discussed counting illegal aliens. See notes 4-6 supra and accompanying text. The question concerning illegal aliens has been temporarily settled by inaction but, in view of the vote in the House on the McDade Amendment, there appears to be substantial support for exclusion and the issue will undoubtedly be raised again. Congress then will confront once more the constitutionality of any exclusion.


122. Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").
indifferently, thus denying the court the benefits of the adversary process and creating res judicata difficulties for subsequent litigants, explains the doctrine, at least in part.

Illegal aliens themselves have a poor claim to standing in a suit challenging congressional action to exclude them from the census.\textsuperscript{123} Organizations of individuals lack standing to oppose the current practice of counting illegal aliens on constitutional grounds.\textsuperscript{124} But states that would lose representatives as a result of a congressional exclusion surely suffer sufficient injury to maintain the needed standing.\textsuperscript{125} Tracing the injury to the challenged action and redressing it through judicial action present few difficulties because both injury and remedy could be identified— with reference to the system currently in use. The factual demonstration that an exclusion would injure a state, and that a court could successfully enjoin an exclusionary system in favor of the current practice, appears imminently feasible. With congressional seats and millions of dollars in funds at stake, states have strong incentives to defend their interests vigorously. Consequently, both the formula and the rationale for the standing doctrine support recognizing the standing of states to sue to redress unconstitutional census procedures.

C. Political Questions

The political question doctrine, like that of standing to sue, preserves the courts' option to evade an unpleasant issue. Consequently, predicting whether the Court will decide an arguably "political question" on the merits defies analytic precision. Based on the standards for classifying a dispute as a political question, however, only a modest case can be made for deeming the exclusion of illegal aliens from the census outside the purview of the Court.

In \textit{Baker v. Carr},\textsuperscript{126} Justice Brennan attempted to catalogue the concerns that had led the Court to decline to decide certain cases under the political question doctrine.\textsuperscript{127} These concerns included the

\begin{enumerate}
\item Because illegal aliens cannot vote, whatever injury they suffer as a result of exclusion from the census would be far more attenuated and speculative than that of the plaintiffs in \textit{FAIR v. Klutznick}. Baker v. Carr, 369 U.S. 186 (1962), and its progeny, recognized standing only for voters whose votes were demonstrably diluted by government policies.

\item The plaintiffs in \textit{FAIR v. Klutznick} lacked standing because they failed to prove injury. The court held that because no particular plaintiff could prove that his own vote would be denigrated by including illegal aliens, a group of persons with characteristics like those of persons who might be injured lacked standing. 486 F. Supp. at 570-75. The court noted that the degree of injury did not bear on the standing question; even a minute dilution of a plaintiff's vote would suffice to confer standing. But plaintiffs failed to establish with certainty that any of them would suffer such a dilution. 486 F. Supp. at 573.

\item Loss of federal funds would not suffice, because such a result follows not from any decision as to how to conduct the census itself, but from the congressional decision to follow census data in allocating funds. 486 F. Supp. at 566 n.3, 569 n.9.

\item 369 U.S. 186 (1962).

\item Prior examples of political questions include Colegrove v. Green, 328 U.S. 549 (1946)
\end{enumerate}
textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicial standards for resolving the issue; the need for an extra-judicial policy determination to decide the question; whether the Court might decide the issue without expressing disrespect for the other branches of the government; or an unusual need for the government to speak with one voice on the question presented. 128 Deciding the constitutionality of excluding illegal aliens from the census would not require application of any standards other than the tools of constitutional interpretation regularly relied on by the courts. Nor would the Court need to indulge any policy preferences other than those expressed in the Constitution. Some disrespect for the political departments of the government inheres in any exercise of judicial review. 129 The disrespect shown by a decision to invalidate the exclusion of illegal aliens is less than that in most cases because the Constitution, whatever its meaning, clearly controls the scope of the census. The meaning of

128. 369 U.S. at 217. This functional approach has also been espoused by commentators. See Frank, Political Questions, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954); Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L.J. 517, 566-97 (1966). Bickel would probably have agreed with the functional approach but he thought all decisions in the area were ultimately controlled by expediency. See Bickel, The Supreme Court 1960 Term—Foreword: The Passive Virtues, 75 HARV. L. REV. 40, 46, 74-79 (1961). Henkin's approach is also functional though he would discard the label of "political question" altogether. "Would not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open that package, assigned its authentic components elsewhere, and threw the package away?" Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597, 625 (1976).

129. This Note will not examine whether Congress or the Court should decide the question of counting illegal aliens within the broad framework of the pros and cons of judicial review per se. For an overview of the controversy, see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1-35 (5th ed. 1980), and sources cited therein. The broad issue of the propriety of judicial review is beyond the scope of this Note and for practical purposes an academic question:

Whether the power of the Supreme Court "to outlaw as unconstitutional acts of elected officials or of officers controlled by elected officials" was intended by the Framers or granted by the Constitution is no longer the real issue. Rather as Dean Eugene V. Rostow has put it, the power of judicial review "has been exercised by the Court from the beginning . . . . And it stands now, whatever the Founding Fathers may in fact have meant, as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation." "The weight of . . . history is evidence that the people do expect the courts to interpret, declare, adapt, and apply these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures."

Choper, On The Warren Court and Judicial Review, 17 CATH. U. AM. L. REV. 20, 37 (1967) (footnote omitted) (quoting Rostow, The Democratic Character of Judicial Review, 66 HARV. L. REV. 193, 193 (1952), and Rostow, The Supreme Court and the People's Will, 33 NOTRE DAME LAW. 573, 576, 590 (1958)). This Note will discuss the pros and cons of judicial review of this particular question within the framework of the political question doctrine and the elements that have, in the past, led the Court to decline to hear a case.
the Constitution, at least since *Marbury v. Madison*, has been "emphatically the province and duty of the judicial department."130 And, in the case of aliens and the census, Congress has repeatedly deferred to the fear that an exclusion would contravene the census clause.131 Surely fulfilling a function that the legislature expects the courts to exercise expresses no disrespect for the political departments of the national government. Nor does the apportionment of United States representatives, as distinct from the issue of illegal immigration itself, implicate foreign relations so as to require governmental unanimity on the issue. Representation for illegal aliens will have remote, if any, consequences for the flow of illegal immigration.

The remaining possibility for declining to adjudicate the issue under the political question doctrine is a "textually demonstrable commitment" of the issue to another governmental department. Arguably, the question of whether to include illegal aliens in the population base lies within the purview of Congress. Article I, section 2, provides that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."132 This language would appear to give Congress wide discretion in directing the census.133 And the results of the census challenges in federal court support the notion that the courts are reluctant to interfere in this area.134 Further, section 2 of the fourteenth amendment provides that representation shall be reduced for states that abridge voting rights for males over twenty-one years old. A New York resident tried to enforce this provision in the federal courts, but was denied relief.135 Although the cases in the lower federal courts tend to be dismissed on standing grounds rather than disposed of as political questions, they do evince an overall discomfort on the part of the courts with these questions.136


131. *See* note 4 *supra*.


134. *Id*.


136. The Supreme Court has not been faced with the question of whether Congress has binding authority to decide issues arising under the census clause. On the issue of whether to include illegal aliens, the Court could decide (1) that it was within the prerogative of Congress, and its decision binding on the courts, (2) that congressional prerogative only applied to some portions of the clause, (3) that Congress had authority but had exceeded that authority, or (4) that the clause did not confer unreviewable authority on Congress and that its decision was acceptable (or unacceptable) on the merits.
On the other hand, the Court has intervened in some cases characterized by stronger arguments for the legislature's prerogative.\textsuperscript{137} The discussion of political questions in \textit{Baker v. Carr} does not clarify whether one factor alone suffices to cause the Court to deny review.\textsuperscript{138} The guarantee clause, thus far the only constitutional provision immune to judicial review,\textsuperscript{139} encompasses two factors: judicial incompetence and congressional authority to decide the issue.\textsuperscript{140} Moreover, certain language in \textit{Baker v. Carr}, consistent with the functional approach to political questions, suggests that the underlying factors rather than the clause itself have led to this result, leaving open the possibility of future litigation under the guarantee clause.\textsuperscript{141} Given this background, a finding that the census clause conferred authority upon Congress may not suffice to label the issue of whether to count illegal aliens in the census a political question.

Because the Court has not had to decide whether census clause claims lie entirely within the purview of Congress, it is not confined by precedent and has a number of options.\textsuperscript{142} One such option is to decide that only portions of the clause fall within congressional discretion. This approach would enable the Court to avoid questions of the manner of enumeration, expressly assigned to Congress,\textsuperscript{143} and, at the same time, to review a congressional interpretation of the phrase "whole number of persons."

The constitutional language itself suggests this distinction between congressional discretion to administer the census and discretion to count some "persons" and not others. The text commits only the manner of enumeration, and not the persons to be enumerated, to the prerogative of Congress. Such a distinction comports with the federal model of the census clause defended throughout this Note, for little likelihood exists that the states would have surrendered their sovereignty to a national government with unfettered discretion to manipulate the Great Compromise so precisely worked out to


\textsuperscript{138} See \textit{Scharpf, supra} note 128, at 566-67. Scharpf's discussion indicates that a variety of factors operate.

\textsuperscript{139} See \textit{Henkin, supra} note 128, at 607-10.

\textsuperscript{140} See notes 127-28 \textit{supra} and accompanying text. Some commentators say that the real problem with the guarantee clause is that hearing cases under the clause would provoke a head-on confrontation between the Court and other branches of government, see P. \textit{Strum, supra} note 152, at 35; cf. C. \textit{Black, Structure and Relationship in Constitutional Law} 67-99 (1969) (drawing a distinction between the authority to review acts of Congress and the authority to review acts of the states). Other commentators point out that the Court has decided several difficult issues and this factor alone cannot explain a decision to deny relief based on the political question doctrine. See \textit{Scharpf, supra} note 128, at 566.

\textsuperscript{141} 369 U.S. at 217-18.

\textsuperscript{142} See, e.g., note 136 \textit{supra}.

\textsuperscript{143} See text at notes 132-33 \textit{supra}.
overcome the profound doubts of large and small states alike.144

Even if the Court decided that the entire clause assigns authority to Congress, the question whether Congress has exceeded the authority granted remains.145 A pure grant of authority, without more, may not preclude judicial review.146 In this case, the Court would have to decide whether a decision by Congress to exclude illegal aliens from the apportionment base went beyond the authority conferred. This approach necessarily goes to the merits of the decision. If the word "person" is ambiguous as applied to illegal aliens, Congress could decide to exclude this group. If the word "person" is not ambiguous and expressly includes all people within the territorial jurisdiction of the state, as this Note argues, then Congress would have exceeded its grant of authority. In either case, the Supreme Court would review the decision.

D. Arguments for Judicial Review

Beyond the customary desire to see justice done on the merits, two particular concerns support judicial review of any congressional effort to exclude illegal aliens from the census. First, the census clause establishes a system for allocating representatives among the states. The clause amounts to an agreement among the states governing the distribution of political power among them.147 The plan is fundamental to the structure of the government, and should remain stable regardless of whom a transient majority would exclude from representation.148 Unless Congress decided to exclude aliens from the population base, changing existing procedures, the Court would be unlikely to interfere. The Court, however, should review any decision to change the formula for allocating representatives

144. See notes 34-39 supra and accompanying text. By analogy, the framers were so concerned that the arrangement in the Senate not be altered that they inserted a provision insulating the scheme even from constitutional amendment. A state cannot be given less than two senators without its consent. U.S. CONST., art. V. Surely they could not have intended that the scheme of representation designed for the House could be altered by something less than constitutional amendment.

145. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

146. This relates to the argument that issues involving political questions contain more than one of the factors under consideration. See notes 138-41 supra and accompanying text.


148. Arguably, so long as the majority that chose to abandon the current practice was elected under it, the resulting change would not abrogate the original compact agreed to by the states. This, however, ignores the interests of minority states, which may have entered the agreement because the Constitution guaranteed the stability of the system of allocating inter-state representation.
among the states because the failure to do so would relegate the remedy for an abuse of power to the legislative majority responsible for it.

Second, leaving the constitutional meaning of "person" to the discretionary definition of the legislature poses subtle but serious risks. The Constitution speaks repeatedly in terms of people and persons. Aside from the need for consistency, these provisions ought not to depend on the good will of political majorities, for it is precisely against majority abuse that they were meant to guard.150

CONCLUSION

The language and history of the census clause leave little doubt that the framers intended to include all persons in the census that apportions representatives. The intent to count persons reflects the conviction that the states as political entities, rather than individuals as citizens or voters, enjoy the right to representation in the national legislature. This territorial model of representation, viewing persons within the jurisdiction of the state as the measure, but not the source, of a state's entitlement to representation, requires counting illegal aliens in the decennial census. Contemporary notions of equality in voting rights do not conflict with, or outweigh in constitutional importance, the principles of federalism expressed in the census clause. The courts should not hesitate to defend those principles.

149. See Cox, The Role of the Supreme Court in American Society, 50 MARQ. L. REV. 575, 579 (1967) ("One special charge of the Court is responsibility for the framework of our government.").

150. See text at note 31 supra. One obvious possible abuse concerns a decision by the political branches to legalize undocumented immigration for the purpose of gaining political advantage. So long as personhood for purposes of representation depends upon variable legal categories rather than upon enduring constitutional standards, the temptation of this sort of political exploitation will remain.